Supreme Court, U.S.
FILED
MAR 26 1993
OFFICE OF THE CLERK

No. 92-1237

In The

Supreme Court of the United States

October Term, 1992

PHILLIP LEE HULL, a minor by his natural parents, guardians, and personal representatives, PHILLIP GENE HULL and TANYA LEE HULL, husband and wife,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Guardian ad litem for Phillip Lee Hull

March 26, 1993

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REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. A Writ of Certiorari should be denied because the parents of Phillip Lee Hull are without lease standing to file this Writ.

The Petition for a Writ of Certiorari declares that the Petition is brought by the "natural parents and personal representatives of Phillip Lee Hull," by attorney Stephen C. Wolfe in this action which arose under the Federal Tort Claims Act. 28 U.S.C. §2674. However, the parents of Phillip Lee Hull are without standing to bring this petition to the Court.

The only person with authority to bring this petition is the Guardian ad litem of Phillip Lee Hull, Judith A. Finn. The Guardian ad litem was appointed pursuant to Rule 17(c) of the F.R.Civ.P by the District Court. It is her duty, and hers alone, to represent the legal interests of the minor child, Phillip Lee Hull. The Court of Appeals, in its ruling on the appeal of this case, stated that the Guardian ad litem is the legal representative of Phillip Lee Hull, not the parents, for purposes of this litigation. *Hull by Hull v. U.S.*, 971 F.2d 1499, 1505 (10th Cir. 1992), citing *Garrick v. Weaver*, 888 F.2d 687, 692-93 (10th Cir. 1989).

In *Garrick v. Weaver*, the Court of Appeals for the Tenth Circuit held that a guardian ad litem appointed pursuant to Rule 17(c) is an "other like fiduciary" which would bar the parent from proceeding as next friend for her children on the matter for which the guardian ad litem was appointed. Therefore, the parent had "no standing to raise claims on appeal on behalf of her children." *Id.*, 693. See also *Susan R.M. v. Northeast Indep.*

School Dist., 818 F.2d 455, 458 (5th Cir. 1987), and *Developmental Disabilities Advocacy Center, Inc., v. Melton*, 689 F.2d 281, 285-286 (1st Cir. 1982).

The policy considerations noted by the court include preventing the parents and the guardian ad litem from advocating inconsistent positions on appeal on behalf of the minor child.

> Allowing two parties, the court-appointed guardian ad litem and Garrick, to represent the minor children interferes with the orderly development of the lawsuit because the minor children could take inconsistent positions through their multiple representatives. This case illustrates the problem. The only issue that is contested by the guardian ad litem is Melton's attorneys' fees. The other issues, i.e., the freedom of religion, delayed disbursement, and lack of maintenance claims, would not be a case of controversy if the guardian ad litem were the only party with standing to take positions of the children's behalf because the guardian ad litem is not challenging the magistrate's order with respect to those issues.

Garrick v. Weaver, 693. The analogy to the case at bar is clear. The Guardian ad litem sought a reversionary provision in the trust document to be approved by the District Court. The Tenth Circuit agreed with the Government and the Guardian ad litem that the District Court had the power to approve such provision, upon the consent of the Guardian ad litem for Phillip Lee Hull. On remand, the District Court entered revised Findings of Fact and Conclusions of Law which provided for a reversionary provision in the trust document. Now the parents of Phillip

Lee Hull, in petitioning the Court to overrule the Court of Appeals on the sole issue of a reversionary provision in the trust, have taken a position directly opposed to the position taken by the Guardian ad litem of the minor child. It is exactly this inconsistency that the Court of Appeals anticipated and disallowed in *Garrick v. Weaver*, and which must be disallowed in the case at bar.

In the case at bar, the parents were not parties to the appeal in that they brought no question to the Court of Appeals on their own behalf. The parents of Phillip Lee Hull are, no doubt, the persons most likely to benefit from a non-reversionary trust. Indeed, they make no argument in their Petition that they are acting in the best interests of Phillip Lee Hull. Clearly, it would be difficult to make such an argument, since the lump sum award was made for the care and treatment of Phillip Lee Hull, and if he should die before his projected life expectancy of 72 years, the parents would receive a windfall. The parents' conflict of interest becomes self evident when "an independent neutral guardian ad litem and an impartial judge agree" on what is in the best interest of the minor child, while the parents continue to pursue the hope of inheriting the funds awarded to their son.

Without the attempt by the parents to circumvent the clear purpose of Rule 17(c) of the F.R.Civ.P. and to challenge by this means the position taken by the Guardian ad litem on behalf of Phillip Lee Hull, no case or controversy would exist. Because the parents have no standing to present the Petition for Writ of Certiorari, the Petition should be denied.

II. The Guardian ad litem has not authorized the filing of a Writ of Certiorari.

The Guardian ad litem has sole authority to act on behalf of the minor child in this case, pursuant to Rule 17(c). The federal circuit courts are in agreement that the guardian ad litem is *"appointed as a representative of the court to act for the minor in the cause, with authority to engage counsel, file suit, and to prosecute, control and direct the litigation.* As an officer of the court, the guardian ad litem has full responsibility to assist the court to 'secure a just, speedy and inexpensive determination' of the action." (emphasis added) *Noe v. True*, 507 F.2d 9, 12 (2nd Cir. 1974), citing *Fong Sik Leung v. Dulles*, 226 F.2d 74, 82 (9th Cir. 1955). *Garrick v. Weaver, supra* 693.

Similarly, the Ninth Circuit has emphasized the authority of the guardian ad litem in regard to retention of counsel:

> A guardian ad litem is authorized to act on behalf of his ward and may make all appropriate decisions in the course of specific litigation. For example, notwithstanding the incompetency of a party, the guardian may make binding contracts *for the retention of counsel* and expert witnesses and may settle the claim on behalf of his ward. (emphasis added)

United States v. 30.64 Acres of Land, 795 F.2d 796 (9th Cir. 1986).

In the case at bar, the Guardian ad litem has given no authority to other counsel, that is, to Stephen C. Wolfe, to file a petition for Writ of Certiorari on behalf of Phillip Lee Hull. On this ground, the Writ should be denied.

III. No conflict exists between the circuits on the question of whether a district court has the discretionary power to protect its ward by approving or ordering a reversionary provision in a trust document.

The Petition for a Writ of Certiorari suggests that the opinion of the Court of Appeals for the Tenth Circuit conflicts, directly or in principle, with the decisions of the First, Second, Third, and Seventh Circuits. The Petition misconstrues the holdings of these cases.

The Third Circuit has taken no position on the issue of a reversionary provision in a trust plan in the case cited in the Petition, *Frankel v. Heym*, 466 F.2d 1266 (2nd Cir. 1971). The holding in *Frankel* is based solely on the fact that the proposed trust was to be supplemented with additional funds from the United States, "as the court should require." In disapproving of this plan, the court contrasted the supplemental provision of the trust plan with the lump-sum requirement of the Federal Tort Claims Act (FTCA). The opinion is silent as to the trust issue per se and as to the reversion issue specifically, except that the court, in a footnote, speaks with approval of the beneficial function of a reversionary provision.

> The obvious advantage of this arrangement would be to prevent the award, intended as compensation to the injured person, from becoming a windfall to others who would control its use and disbursement.

Id., 1228, fn.1.

The Second Circuit has not ruled on the issue of the court's authority to form a trust under the FTCA, the

discretion of the court to order a reversionary provision in cases involving minor children, or the issue of what constitutes a lump-sum payment by the government in a FTCA case; and thus it cannot be said, as Petitioner states, that the Second Circuit follows the Third Circuit approach. In the district court case on which Petitioner relies, *Andrulonis v. U.S.*, 724 F. Supp. 1421, 1519-1520 (N.D.N.Y. 1989), the court was not faced with the issue of trusts, reversionary or not. The district court cites to the *Frankel* opinion in a footnote, not in a holding of the case:

> Initially it should be noted that the FTCA contemplates a lump sum award, and this Court lacks the power to enter judgment in this case "in terms other than a simple award of money damages," and thus cannot mandate the purchase of an annuity or otherwise structure its award.

This comment is in no way relevant to the case at bar, since the district court did not order the purchase of an annuity, and has specifically rejected any plan to structure the award to the minor child. In the appeal of the *Andrulonis* case to the Court of Appeals for the Second Circuit, the issue of lump sum awards under the FTCA was not raised. *Andrulonis v. U.S.*, 925 F.2d 1210 (2nd Cir. 1991). Thus, the Second Circuit cannot be considered to have "followed" the Third Circuit. Nor can it be said that the Third Circuit has taken a position contrary to that of the Tenth Circuit in *Andrulonis* case. Indeed, the Tenth Circuit noted that there is no "lump sum" issue in this case because the government *is* paying a lump sum.

The Seventh Circuit has either ordered or approved of agreements placing the lump sum award in a reversionary trust in order to assure benefit accrues only to the minor child. In *Robak v. U.S.*, 503 F. Supp. 982, 983 (N.D. Ill. 1980), *aff'd in part and rev'd in part on other grounds*, 658 F.2d 471 (7th Cir. 1981), the parties agreed to a fully reversionary trust, and the court approved it, based on the rationale that "It permits this Court to award funds to fully cover 71.8 years of expenses, without being concerned with the possibility of unjust enrichment in the event that Jennifer enjoys a life span shorter than that projected by the insurance life tables, thereby substantially reducing her maintenance costs to a lesser amount of dollars than the full trust proceeds. " *Id.* In *Nemmers v. U.S.*, 795 F.2d 628, 635-36 (7th Cir. 1986), the parents did not agree to a reversionary trust and no guardian ad litem had been appointed. Thus, the facts are not analogous to the case at bar. The Seventh Circuit has not ruled against trusts, reversionary or not. In fact, in *Nemmers*, the Court noted that if there is a concern about parents abandoning the child or "dipping into the award for their own purposes," the court should appoint a guardian ad litem. The only prohibition in this case is that courts may not *reduce* awards to prevent a windfall to the family. Further, the Court clearly recognized the Court's power to protect its wards by ordering the purchase of an annuity. *Nemmers*, 795 F.2d at 636.

The same rationale was present in First Circuit decisions. In *Reilly v. U.S.*, 665 F. Supp. 976, 1020 (D.C.R.I. 1987), the district court ordered a future care trust with a reversion over the portion "that would otherwise confer a pure windfall upon Heather's heirs in the event of

Heather's institutionalization before the year 2026." On appeal, the First Circuit, in rejecting the government's attempt to fashion a structured payout of damages, spoke with approval of the Court's order to place the damage award in a trust, in order to protect the interests of the minor child. The First Circuit agreed with the Seventh Circuit regarding the Court's powers to protect its ward:

> After the wrong doer and its funds have been parted, the focus shifts: it cannot be doubted that the Court has power (1) to ensure that the recovery benefits the victim, and (2) to exercise strict supervision over investment and use of the funds if the victim is in a legal incompetent or otherwise in need of protection.

Reilly v. U.S., 863 F.2d 149, 169, 170 (1st Cir. 1988). *Accord, Friends for All Children v. Lockheed Aircraft*, 563 F. Supp. 552, 557 (D.C.D.C. 1983), and *Wheeler Tarpeh-Doe v. U.S.*, 771 F. Supp. 427 (D.C.D.C. 1991), where the courts approved trusts on behalf of minor litigants.

Because the petition has shown no conflict between the federal circuits on the issue decided by the Tenth Circuit, and because, in fact, complete harmony exists among the federal circuits, that, as long as the damages are awarded in a lump sum, the district courts have the inherent power to protect the interests of their wards in a variety of ways, such as approving of or ordering trust arrangements, the Petition for Writ of Certiorari should be denied on this ground as well.

IV. The courts have an inherent duty to see that the rights of a minor child are protected.

The inherent power of the Court to approve the recommendation of the Guardian ad litem regarding the formation of and provisions in a trust document for a minor child is not at issue among the federal courts. They agree that the courts have this power, and they agree that this power comes from the fact that a minor child is a ward of the court.

> An infant party to an action is the ward of the court and it is the court's duty to see that the infant's rights are protected. This is particularly true whenever the property rights of an infant are involved in litigation.

United States v. E. I. duPont de Demours & Co., et al., 13 F.R.D. 98, 104 (N.D. Ill. 1952).

> The infant is always the ward of every court wherein his rights or property are brought into jeopardy, and is entitled to the most jealous care that no injustice be done him.

duPont, III v. Southern National Bank of Houston, Texas, 771 F.2d 874, 882 (5th Cir. 1985), quoting *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 725 F.2d 1392, 1400 (D.C. Cir. 1984). *Reilly v. U.S.*, 863 F.2d 149, 169-170 (1st Cir. 1988).

In *Friends for All Children v. Lockheed Aircraft*, 563 F. Supp. at 557, the court approved a trust to be set up for minor children, upon the recommendation of guardians ad litem and in spite of objections by some adoptive parents. There the court stated that it had a duty to protect the interests of minor children who were litigants:

> In creating and retaining general supervision over a central trust in this case, therefore, the Court is relying on its undisputed jurisdiction over the original litigation, its responsibility under Rule 17(c) to safeguard the interests of infant litigant who appear before it.

No court has refused to set up a trust for a minor child when either the parents or the guardian ad litem have so requested, and no court has suggested that a reversionary provision in such a trust violates the spirit or letter of the FTCA.

V. The opinion of the Tenth Circuit does not conflict with prior decisions of this Court, nor does it create a new remedy.

The Petition for Writ of Certiorari states that the Tenth Circuit opinion invents a new remedy, "a remedy that is not available to defendants in private tort actions," and a remedy which does not advance the purposes of the Federal Tort Claims Act. No new remedy has been created by the Tenth Circuit. The Tenth Circuit held that "the district court has the inherent authority to order that Lee's damages be paid in the form of a fully reversionary trust if it concludes that it is in Lee's best interest, so long as the government's obligation to Lee ceases when it pays a fixed lump sum to fund that trust." This holding is based on two long-standing, well-established legal principles, which are consistent with holdings of federal courts at all levels. First, it is based on the Court's *inherent* power to make orders as to the disposition and protection of funds of a minor child, to the extent needed to protect

the child's best interest. Second, the holding acknowledges the requirement under the FTCA that the government is to pay a fixed lump sum, and the government's obligation to the minor child must cease when it pays a fixed lump sum.

Neither of these principles contradicts any portion of either of the two cases cited in the Petition in support of the proposition that the Tenth Circuit has created a new remedy. In *Feres v. United States*, 340 U.S. 135, 139, 71 S. Ct. 153, 156, 95 L. Ed. 152 (1950), the Supreme Court stated:

> This Act, however, should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and *equitable* whole. (emphasis added)

In *Dalehite v. United States*, 346 U.S. 15, 31, 73 S. Ct. 956, 965, 97 L. Ed. 1427 (1953), the Supreme Court restated the maxim that while the United States is liable in the same manner and to the same extent as a private individual under like circumstances, the right to sue comes from Congress; and individuals suing under the FTCA must take that right subject to such restrictions as have been imposed. Thus, the right to sue under the FTCA is not unqualified. Nothing in these cases contradicts or is inconsistent with the holding of the Court of Appeals for the Tenth Circuit.

The Petition for Writ of Certiorari should be denied for failure to establish that the opinion of the Tenth Circuit conflicts with prior decisions of this Court, and for failure to prove that it creates a new remedy.

VI. The Petition does not establish either in law or in fact that the opinion of the Tenth Circuit raises important and unresolved problems.

In *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S.Ct. 614, 99 L.Ed. 897 (1955), the case cited in the Petition to support the proposition that the opinion of the Tenth Circuit raised special and important issues requiring the granting of the Petition, the Court was referring to cases which are totally unlike the case at bar. In fact the *Sioux City* case involved a dismissal of a Petition for Writ of Certiorari. Nothing is "special or important" about the case at bar except that the minor child needs to receive his funds as soon as possible so that his chances for a long and full life are enhanced. As shown above, no federal question "of substance" has been raised, nor is there any conflict with applicable decisions of this Court. The case herein does not present "an intellectually interesting and solid problem." In fact, none of the appropriate criteria for granting a Writ of Certiorari exist in the case at bar. As the court stated in *Sioux City*, the "Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants." *Id.* The Petition for Writ in this case transparently seeks the benefit of non-litigants.

Because the Petition satisfies none of the prerequisites established by the Supreme Court for granting petitions for writ of certiorari, and because the law and the facts of the case at bar have not been accurately represented to the Court, the Petition for Writ of Certiorari should be denied.

CONCLUSION

The Petition for Writ of Certiorari should be denied for the reasons that Petitioners lack standing and because the cases they cite do not establish a conflict among the Circuits on the issue of the authority of the courts to order or approve a reversionary trust. Further, no other valid reason has been offered in support of granting this Petition.

In addition, the Guardian ad litem should be granted just damages and double costs on behalf of the minor child, pursuant to Rule 42.2 of the Supreme Court Rules, because the Petition is frivolous and unfounded in law and fact, and because the delay caused by the filing of this Petition unreasonably delays the award of damages to the minor child. The evidence adduced at trial clearly established that unless Phillip Lee Hull receives proper therapy, therapy equipment, and highly specialized treatment during his early childhood years, his award of damages in this action will be of greatly diminished value to him. Delay in receiving the benefit of his damage award delays the many specialized services which the district court determined that he needs immediately. Relief delayed is relief denied. For the parents of Phillip Lee Hull to delay this opportunity in order to obtain the benefit of his funds upon his death is unconscionable.

Respectfully submitted,

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